In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.
No. 285.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on a writ of error to the United States Circuit Court for the Southern District of New York. The writ of error is brought to review a decision of the said court, sustaining a demurrer to an indictment.

The defendant in error was indicted for giving rebates in violation of section 1 of the act of February 19, 1903, "To further regulate commerce with foreign nations and among the States," known as

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the Elkins law. The material portions of this statute are set forth on pages 14 et seq.

The indictment contains twelve counts, charging as many distinct violations of the Elkins law. The single ground upon which the court below based its decision arises under each count, all of which are substantially similar in form. The material allegations of each count are in substance as follows:

First. That four railway common carriers, including the Missouri Pacific as an initial carrier, and the defendant as one of the connecting carriers, " had established a continuous through line and route " from the city of Poplar Bluff, in the State of Missouri, to the city of New York, in the State of New York, over which they handled freight under a common management, arrangement, and control. These four carriers and their through line are shown, for the convenience of the court, upon the map annexed to this brief.

Second. That the same four carriers had " jointly established * * * a joint tariff of rates, fares, and charges, * * * which said tariff was in force at all such times upon the aforesaid continuous line and route," and which tariff set forth as the rate upon freight of the character in question, viz, cooperage materials, over the said through line, a rate of 35 cents for each 100 pounds thereof.

Third. That this joint tariff had been, by the Missouri Pacific Company (the initial carrier

aforesaid) filed with the Interstate Commerce Commission and published in accordance with law.

Fourth. That thereafter, and pursuant to the terms of an unlawful agreement between a certain shipper, the Brooklyn Cooperage Company, and the defendant railroad company, the terms of which are set forth in the indictment, and which is charged to have been entered into, that "such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid," the said shipper delivered to the Missouri Pacific Company for shipment and transportation over the said through line to New York certain cooperage material described in the indictment and the same was thereupon transported by said four carriers over the said through line to New York.

Fifth. The indictment then charges "that the lawful tariff rate of 35 cents for each 100 pounds thereof according to the tariff aforesaid was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers."

Sixth. That thereafter, and p uant to said agreement, the defendant paid to the said shipper "by way of rebate and concession in respect of the transportation of the aforesaid * * * cooperage material" a certain sum of money.

The indictment thus sets forth that the tariff in question was "*established*" by the defendant and its associate carriers over the through line, of which

the defendant's railroad forms a part; that this tariff, when so established, was filed and published in accordance with law by the Missouri-Pacific Company, the initial carrier; that the defendant participated in this tariff rate by receiving and transporting freight at the said tariff rate, and by accepting payment thereon, according to the said tariff rate; and finally that the defendant entered into an unlawful agreement, founded upon the existence of this tariff rate, and did so for the purpose of violating it.

In the language of the court below:

> *The substantial ground of demurrer is that because the New York Central road did not either file or publish this tariff it committed no offense against the statute by paying the rebate agreed upon.*

See *Opinion,* Record, page 28, 157 Fed. Rep., 293, 294.

Upon this ground alone the court sustained the demurrer, and the correctness of this decision is the sole question presented for review.

See *Assignments of error,* Nos. 1, 3, 6, 7, 8, 9, 10, 11. (Rec., p. 33.)

The court below thus holds that a carrier can with impunity pay rebates from a joint tariff established by itself, in which it has participated, and which has been duly filed and published by its connecting carrier, provided that the carrier paying the rebate has not itself filed or published the same

tariff. The consequences of such a decision, if correct, can not well be exaggerated.

As we shall show under point four, it would affect not merely transactions under the Elkins law, but also transactions under the present Hepburn law, which in this respect reenacts the Elkins law. It would defeat the purpose and destroy the whole force of those laws so far as through freight traffic is concerned.

The question thus presented by this writ of error is not, therefore, a mere matter of criminal pleading. It is a question which involves the interpretation, in a most vital particular, of an important federal statute.

OUTLINE OF ARGUMENT.

We shall attempt to show in this brief that the Elkins law is not thus defective to meet such a transaction, as the Circuit Court holds, but that—

First. The very method of rebating herein charged was prevalent prior to 1903; was called to the attention of Congress by the Interstate Commerce Commission; provisions were inserted into the Elkins law for the avowed purpose of stopping the practice, and the enactment of these provisions constitutes a construction of the law to the effect that it covers the precise offense here charged.

Second. The provisions of the first section of the Elkins law expressly cover and make criminal the transactions set out in this indictment, and other

independent clauses of that act, not noticed by the court below, also penalize the offense.

Third. The Government's view of the construction of this law is in accord with that expressed by this court in the Cisco Oil Mill case, and has been supported by all reported opinions of lower courts; while the view of the court below, if carried to its logical conclusion, would produce results expressly condemned by this court in the Cisco case and necessarily contrary to its decisions in the Armour and Burlington cases.

Fourth. To sustain the defendant's contention would emasculate not only the Elkins law but the Hepburn law as well.

Fifth. Other objections raised by defendant's demurrer to the indictment may be briefly disposed of.

POINT ONE.

The very method of rebating herein charged was prevalent prior to 1903; was called to the attention of Congress by the Interstate Commerce Commission; provisions were inserted into the Elkins law for the avowed purpose of stopping the practice, and the enactment of these provisions constitutes a construction of the law to the effect that it covers the precise offense here charged.

1. In the case of a through line created by several connecting carriers, there is a manifest difference in the relation which the initial carrier maintains to the shipper from that maintained by the other connecting carriers. It is the initial carrier who quotes the rates to the shipper, accepts the goods for shipment, and usually receives the payment.

Thus the initial carrier is the one to whom the shipper naturally looks for the rates and who is, therefore, the natural one to file and publish the tariff affecting the through line. Ordinarily the shipper has no communication with the subsequent carriers who receive and forward the goods. The only communication which such connecting carriers have with reference to the transactions is usually with the initial carrier to determine whether or not they will accede to and join in the proposed rate, and the best evidence of their participation in a through rate, as in a through route, is their acceptance of freight upon a *through waybill* fixing the route and the rate, and the conventional division of the charges. This has been stated by this court to be the regular test for determining whether a carrier has accepted the obligations of a through route.

> But when the Georgia Railroad Company enters into the carriage of foreign freight by agreeing to receive the goods by virtue of foreign through bills of lading and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the federal act in respect to such interstate commerce.

* * * * *

> *All we wish to be understood to hold is, that when goods shipped under a through bill of lading from a point in one State to a point in another are received in transit by a state common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce.* When we speak of a through bill of lading we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested. (*Cin., N. O. & T. P. R'way Co.* v. *Int. Comm. Comn.*, 162 U. S., 184, 192, 193.)

2. In the course of its administration of the original interstate commerce law, the Interstate Commerce Commission very early reported on the question of holding the connecting carrier to the obligations of a through tariff filed only by the initial carrier. In 1894 it reported:

> When such a tariff is filed by one of the associated lines only, as is usually the case, if the other participating carriers are not designated, and no proof of their concurrence is furnished, it is quite possible for the latter to avoid liability when charged with criminal misconduct in respect of a joint rate so issued by denying knowledge of its existence or consent to its publication, although the fact that they carried traffic apparently under that

tariff may be clearly established. (Annual Report of Int. Comm. Comn., 1894, p. 32.)

In an opinion rendered on September 8, 1894, the Commission put the matter even more clearly:

> *If a connecting carrier which joins in the transportation of freight received from the initial carrier is prosecuted for violating the joint rate published by that initial carrier alone, there can be no conviction without proof, often impossible to obtain, that such connecting carrier agreed to the joint rate in question or authorized its promulgation.* On the other hand, if it is assumed that the connecting carrier is not a party to the joint rate so issued, for want of assent thereto or concurrence therein, and the charge of unlawful conduct is based upon the acceptance of less than its own local tariff, such connecting carrier may refute the accusation by asserting that it had consented to the joint schedule issued by an initial carrier and was in fact a party thereto. Thus the ground of defense can be shifted to meet the theory of the prosecution, and a given carrier actually guilty of wrongdoing may secure immunity from punishment through inability to determine before its disclosure is forced whether it is or is not bound by the joint tariff which another carrier has published and filed. (6 I. C. C., Rep., p. 272.)

Specific instances of such difficulties were cited in the Commission's Annual Report for 1898, at page 7. Also in its Annual Report of 1902, at pages

28 and 29. In fact, during the years preceding the passage of the Elkins law, no subject was more constantly before the Commission and none received more thought and care.

The difficulty was rendered greater because, under the then existing law, the Commission had ruled that only one of the several connecting carriers was required to file or publish a joint tariff. (See First Annual Report, Int. Comm. Comn., pp. 134, 135, 136.)

The efforts of the Commission were, therefore, directed along two lines:

First. To secure legislation compelling carriers who did not file or publish a joint tariff to put on record written evidence of their concurrence in it. (See Report of 1891, at page 239; Report and Opinion of Dec. 8, 1894; reported in 6th I. C. C. Rep., p. 272; Annual Report of I. C. C., 1895, pp. 22–111.)

Second. To secure legislation making participation in a through rate filed by another carrier binding upon a connecting carrier who participates in the rate, irrespective of whether it had filed the rate or not.

3. It is with this latter recommendation that we are concerned in this case. This recommendation as to participation by a connecting carrier was coupled with another by the Commission, perhaps the most important it has made and the one most strongly insisted upon by it, namely, that the filed

tariff should be the only legal standard of rates and that any departure from that standard should be a violation of law, irrespective of whether or not any other shipper was discriminated against by such departure.

This last recommendation of the Commission was brought out by a decision of Judge Grosscup in the Hanley case, holding that under the old law to sustain an indictment for discrimination, the prosecutor must show not only that the favored shipper received a rebate but that other less favored shippers did not. (*U. S.* v. *Hanley*, 71 Fed. Rep., 672, decided in January, 1896.)

To meet this entire situation the Interstate Commerce Commission recommended in 1897 that section 10 of the original act should be amended by enactment of the following provisions, among others:

> 8. In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier shall in every case also be deemed to be the act, omission, or failure of such carrier as well as that of the person.
>
> 9. Whenever any carrier files or publishes a particular rate under the provisions of this act *or participates in any rate so filed, or published,* that rate as against such carrier, its officers, or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any de-

parture from such rate, or any offer to depart therefrom, shall be deemed unjust discrimination. (Rep. of I. C. C., 1897, p. 149. See also p. 60.)

4. These recommendations were renewed from year to year until, finally in 1903, they were enacted as a part of section 1 of the Elkins law without any substantial change, except that the words at the end "shall be deemed unjust discrimination" were changed to "shall be deemed an offense under this section of this act."

5. It thus appears that the method alleged in this indictment to have been adopted in this case by the defendant, The New York Central and Hudson River Railroad Company, of evading the obligations of a joint tariff by having that tariff filed and published only by the initial carrier and having the rebate therefrom paid by one of the connecting carriers was an evil which was prevalent long before the passage of the Elkins law; was reported on with emphasis by the Interstate Commerce Commission to Congress, together with proposed legislation to remedy the evil, and this proposed legislation was enacted without substantial change into the amending act of 1903.

The actual intention of the legislative body, therefore, with reference to such a transaction is perfectly clear. It intended to put an end to the abuse. And any construction of the act by a court which thwarts this admitted intention must be based upon very clear grounds indeed.

> It is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before. (Justice Holmes in *Johnson* v. *U. S.*, 163 Fed. Rep., 30–32; C. C. A.)

6. Particularly is this so in the case of the interstate commerce laws, of which statutes this court has said:

> It can not be challenged that the great purpose of the act to regulate commerce whilst seeking to prevent unjust and unreasonable rates was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial *and is therefore entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.* (*New York, New Haven & Hartford R. R. Co.* v. *Int. Comm. Comm.*, 200 U. S., 361, 391.)

The Elkins law being intended to still further remedy this remedial statute was doubly remedial.

> The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike and that the only rate charged to any shipper for the

same service under the same conditions should be the one established, published, and posted as required by law. It is not so much the particular form by which, or the motive for which, this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates duly posted and published. (*Armour Packing Co.* v. *U. S.*, 209 U. S., 56, 72.)

See also *Int. Comm. Comm.* v. *Reichman,* 145 Fed., 235, 240.

POINT TWO.

The provisions of the first section of the Elkins law expressly cover and make criminal the transactions set out in this indictment, and other independent clauses of that act, not noticed by the court below, also penalize the offense.

The first section reads as follows:

That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons except as such penalties are herein changed. The willful failure upon

the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this

section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom,

> shall be deemed to be an offense under this section of this act. (32 Stat., 847.)

The court has doubtless already noted that the successive penal enactments of this section in many instances overlap, and the same transaction may be covered by more than one prohibition. There is no attempt in the section to prevent such overlapping. The section was enacted to remedy certain specific evils which had been pointed out by the Interstate Commerce Commission and to cover certain recommendations of the Commission, and it sought to accomplish these ends by successive enactments upon each of the suggested subjects rather than by a single treatment of the entire group of subjects, such as is to be found in the original law.

As a result the transaction set out in this indictment is covered by no less than three of the penal divisions of the Elkins law, and it can be supported, as we contend, upon any one of the three. The indictment was drawn with special reference to the rebate clause contained in the third of those penal provisions, and we shall take up that clause first.

1. The transaction is covered by the "rebate" clause of the Elkins law.

This clause reads:

> And it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of

> the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give, or solicit, accept or receive any such rebate, concession, or discrimination shall be deemed to be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. (32 Stat., 847.)

The decision of the court below was based upon the assumption of the court that the words "such carrier" (in the clause "tariffs published and filed by such carrier") referred to the carrier proceeded against as defendant.

See *Opinion, Dec. 3, 1907* (Record, p. 29).

This, we submit, is a mistake. The only "carrier" mentioned in the sentence is the "carrier" which conducts the transportation. In the case covered by the indictment this might be any one of the four carriers, e. g., the Missouri Pacific, which actually had filed the tariff. The word "carrier" does not occur in the definition of the persons who may commit the offense. The word there used is

" corporation," and inasmuch as this clause expressly covers and penalizes shippers who receive rebates, as well as the carriers who give them, it is perfectly clear that the word " corporation " can not be limited to carriers. Under the construction of this sentence taken by the court it would be impossible to prosecute any shipper.

On the contrary, we think it perfectly clear that the language of this section penalizes any person or corporation who pays a rebate with respect to the transportation of property by any carrier, even though that carrier is an entirely different corporation. This has been expressly decided in a case where a rebate was paid by a private car company which had not conducted the transportation. (*Int. Comm. Comm.* v. *Reichman,* 145 Fed. Rep., 235.)

In other words, according to the plain grammatical construction of this sentence, as well as according to the well-known purpose of Congress in enacting it, even if the New York Central Company had not been a carrier actually engaged in and participating in this transportation, provided it had paid the rebate in respect of the transportation of property by other carriers and with the result of causing that property to be " transported at a less rate than that named in the tariffs published and filed " by the carriers which did transport it, it would have been guilty of the offense defined.

But in a case like the present where the defendant was actually one of the carriers participating in

the transportation and in the through rate the offense is made perfectly clear by the last paragraph of section 1, which reads as follows:

> *In construing and enforcing the provisions of this section,* the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or *participates in any rates so filed or published,* that rate as against such carrier, its officers, or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act. (32 Stat., 847.)

In the rebate clause Congress was passing a general enactment applicable to both carriers and shippers. It was endeavoring to include all rebate offenses under a single sentence, but, owing to the difference between the position of a shipper and a carrier, it was found necessary to add the subsequent sentence in order to further particularize and define this difference. A carrier has a different means of learning a rate and becoming bound

thereto from that of a shipper. Therefore this sentence was added, as we have already pointed out, for the express purpose of covering the conditions peculiar to carriers, and among other conditions the complex situation presented by joint rates established by several connecting carriers.

The court below asserted that this last paragraph of the Elkins law was a mere "statutory rule of evidence, and does not create any offense new or different from those specifically described and proscribed in the earlier portions of the section." (Rec., p. 28.)

This view seems directly in conflict with the express language of the statute which begins with the words *"in construing and enforcing the provisions of this section,"* thus explicitly defining its own nature. But even if it were a statutory rule of evidence as the court asserts, it is, by its own terms, *" conclusive."* A " conclusive " rule of evidence is to all intents and purposes a rule of substantive law. It *conclusively* creates rights and defines liabilities. If a statutory rule of evidence declares that when a carrier participates in a rate that rate becomes binding on the carrier beyond any possibility of rebuttal or defense, how does the situation differ from a rule of substantive law? That there is no difference is abundantly recognized. (Wigmore on Evidence, sec. 2492.)

> Whenever it is said that a certain thing is essential to liability, but that it is conclusively presumed from something else, there

> is always ground for suspicion that the essential element is to be found in that something else, and not in what is said to be presumed from it. (Holmes' Common Law, p. 134.)

As against the carrier the last paragraph of section 1, like all statutory definitions, is to be read into the provisions of the rebate clause. When so read it defines conclusively the circumstances under which a given tariff shall be deemed effective as against a carrier. In other words, when such a tariff shall be deemed to have been established or put in force by such carrier.

2. This indictment can also be sustained under the first clause of the Elkins law quite irrespective of the rebate clause.

As above stated, the various clauses of the Elkins law sometimes overlap, both with each other and with the preceding law of 1887. This is such a case. The indictment, although drawn with particular reference to the rebate clause, sets out all the necessary ingredients to constitute an offense under the provisions of law enumerated below. That being so, the indictment should be sustained. If *an* offense is well pleaded it need not be the offense which the pleader had in mind. (*Williams* v. *U. S.*, 168 U. S., 382; *Wechsler* v. *U. S.*, 158 Fed. Rep., 579.)

The amendment of the interstate commerce law approved March 2, 1889, provides in section 6:

> It shall be unlawful for any common carrier, party to any joint tariff, to charge, de-

> mand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the commission in force at the time. (25 Stat., 855, 857.)

By the words "*party to any joint tariff*" the foregoing provision clearly refers back to the words in the second preceding paragraph of the same law:

> And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes *establish* joint tariffs of rates or fares or charges for such continuous lines or routes, etc. (25 Stat., 855, 856.)

To be a party to a joint tariff, therefore, means in this section to have jointly established it. This the indictment alleges The New York Central Railroad Company had done.

Again, under section 10 of the act of 1887 any officer or agent of The New York Central Railroad Company would be guilty of a misdemeanor if he should

> willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful (24 Stat., 379, 383),

or if he aided or abetted therein.

Under the first section of the Elkins law of 1903 it is provided:

> That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof which, if done or omitted to be done by any * * * officer * * * or agent thereof * * * would constitute a misdemeanor under said acts or under this act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons. * * * (32 Stat., 847.)

The indictment sets out acts which under the old law would clearly constitute a misdemeanor on the part of Nathan Guilford, the agent of the defendant concerned in them. By this provision of the Elkins law such misdemeanor of Guilford is made the misdemeanor of the corporation.

Section 10 of the old law requires that the acts of the agent shall be "willfully" done or "willingly" suffered. This requirement is further met by the indictment. It charges that Guilford deliberately entered into an agreement for the purpose of causing these goods to be transported "at a less rate than the lawful rate named in the tariff," and that he deliberately and intentionally carried out this unlawful agreement with the result contemplated thereby. (*Armour Packing Co.* v. *U. S.*, 209 U. S.,

56, 85; *Ellis* v. *U. S.*, 206 U. S., 246, 257; *Van Gessner* v. *U. S.*, 153 Fed. Rep., 46, 54.)

3. This indictment can also be sustained under the clause of the Elkins law which penalizes a willful failure to observe the tariff.

This provision reads as follows:

> The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense. (32 Stat., 847.)

The words "such tariffs" in this clause clearly refer to the "tariffs * * * as required by said acts," and are clearly governed by the definitory clause contained in the last paragraph of section 1. The court below expressly admits this and says:

> It follows that participation in the rate filed and or published by the Missouri-Pacific Railway would furnish a conclusive presumption against this defendant, were the indictment based upon an alleged failure either to file the tariff or "strictly to observe" the same. (Rec., p. 28.)

But singularly enough, having admitted our view of this clause of the law to be correct, the court does not notice that the indictment *does* contain all the necessary ingredients of the offense of

failing "strictly to observe the tariff." The indictment having set forth the establishment of the tariff by the defendant, sets forth the defendant's deliberate and willful violation of that tariff. Certainly, a failure to "strictly observe the tariff" could not be more plain.

> It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced in some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute. (*Williams* v. *U. S.*, 168 U. S., 382, 389.)

POINT THREE.

The Government's view of the construction of this law is in accord with that expressed by this court in the Cisco Oil Mill case, and has been supported by all reported opinions of lower courts, while the view of the court below, if carried to its logical conclusion, would produce results expressly condemned by this court in the Cisco case, and necessarily contrary to its decisions in the Armour and Burlington cases.

1. In truth, the ultimate question to be determined is whether the defendant has *established and put in force* the tariff from which it is alleged to have departed. By participating in a joint rate a

carrier establishes that tariff as to its own lines, just as it would establish it by filing or publishing it. The participation, the filing, and the publishing are merely different ways in which the ultimate fact of the establishment of the rate can be shown as against a carrier, and no one of them is intended by the law to be made the sole condition precedent to the establishment of the tariff rate. This is the view taken by this court in the recent *Cisco Oil Mill case.* In that case counsel contended that because it was not shown that the schedule of rates had been published in exact accordance with section 6 of the old law, the court could not assume that such schedule was legally operative. This court brushed it aside, saying:

> The contention is without merit. The filing of the schedule with the Commission and the furnishing by the railroad company of copies to its freight offices incontrovertibly evidenced that the tariff of rates contained in the schedule had been *established and put in force,* as mentioned in the first sentence of the section, and the railroad company could not have been heard to assert to the contrary. The requirement that schedules should be "posted in two public and conspicuous places in every depot," etc., was not made a condition precedent to the establishment and putting in force of the tariff of rates, but was a provision based upon the existence of an established rate, and plainly had for its object the affording of special facilities to the

public for ascertaining the rates *actually in force.* To hold that the clause had the far-reaching effect claimed would be to say that it was the intention of Congress that the negligent posting by an employee of but one instead of two copies of the schedule or the neglect to post either would operate to cancel the previously established schedule, a conclusion impossible of acceptance. (*Texas and Pacific R'way Co.* v. *Cisco Oil Mill,* 204 U. S., 449, 451.)

2. Now the result which the Supreme Court in the Cisco Oil Mill case characterized as " a conclusion impossible of acceptance " is precisely the result which would follow if the interpretation put upon this rebate clause by the court below is correct. If the construing provisions of the last paragraph of section 1 do not cover the rebate clause and those provisions stand alone and unmodified and are to be interpreted with the strictness applied by the court below, the absurd result will follow that in a prosecution against a carrier the Government must allege, and, in case of a traverse, prove, that the tariffs in question have not only been filed, but have also been published " as is required by said act to regulate commerce," that is to say, have been " plainly printed in large type, * * * posted in two public and conspicuous places in every depot, station, or office of carrier," a manifestly impossible task—a task which it was the evident purpose of the said construing provisions of

section 1 to eliminate in respect to prosecutions against the carrier.

3. Now, the present indictment before the court alleges in the first place this ultimate fact of the establishment of this joint rate by the defendant, the New York Central Railroad Company. It then proceeds to allege the specific evidentiary facts from which, according to the statute, the legal liability of the defendant necessarily and "conclusively" follows. The defendant is thus informed by the indictment both of the ultimate fact sought to be established by the prosecution and the specific method of such establishment upon which the prosecution intends to rely. Such an indictment certainly—

> contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet. (*Cochran* v. *U. S.*, 157 U. S., 286, 290.)

It thus abundantly fulfills the aim of criminal pleading.

4. The precise question raised by this demurrer has been repeatedly decided against the defendant's contention by the courts. So far as we are aware there is no decision to the contrary except that of the court below.

(*a*) In a criminal prosecution in the Eastern District of Pennsylvania, Judge Holland charged the jury as to the meaning of these provisions of the Elkins law as follows:

Under the origina lact, as amended in 1889, as to the carrier, any deviation from the joint rates specified in the schedule filed was unlawful, and the Elkins Act so amended this as to the carrier that any departure from a joint tariff filed by it, or any departure from a joint tariff *published by it, or any departure from a joint tariff filed or published in which it participated in the rates so filed or published,* was made unlawful. That part of the Elkins Act which makes it unlawful for the carrier to offer, grant, or give any rebate, concession, or discrimination in respect to the transportation of property, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariff published and filed, *may be extended by the subsequent clause as to the carrier so as to make it unlawful to offer, grant, or give a rebate on joint tariffs in which such carrier participated,* but as to the shipper or a person receiving a rebate the tariff must be filed and published. In other words, it may be unlawful for a carrier to give a rebate, concession, or discrimination on a joint tariff filed by it, or a joint tariff published by it, *or on a joint tariff in which it participated when filed by another, or on a joint tariff in which it participated when published by another, but it is only unlawful for a* shipper to receive a rebate on a joint tariff which is both filed and published. The act, so construed, works no injustice either to the carrier or the shipper. The carrier knows whether it has either filed or pub-

lished a joint rate, or whether it has participated in a joint rate filed or published by another, and if it departs therefrom it does so willfully and with knowledge; and if a shipper receives a rebate on a joint tariff which has been both filed and published, he does so with notice of the lawful rate, and as to him, when the rate is filed and published, he is bound to take notice, and the law will not excuse him if he fails to inform himself when the opportunity is afforded, which the law provides by requiring the filing and the publishing of the rates for his information. (*U. S.* v. *Wood,* 145 Fed. Rep., 405, 409.)

(*b*) The Circuit Court of Appeals for the Third Circuit, in another prosecution arising out of the same transaction as the *Woods case,* while they reversed Judge Holland on another point, sustained his interpretation of the Elkins law in the particular for which we contend. Judge Gray said:

> The act, however, contemplates and provides for a condition of things, where no tariff has been published and filed by the carrier, from whom the rebate is charged to have been received. In such cases it is expressly provided that, if the carrier "participates" in any rates so filed or published by another carrier, "that rate as against such carrier, its officers or agents, shall be conclusively deemed to be the legal rate, and any departure therefrom shall be deemed to be an offense," etc. It is obvious that such a participating carrier has full knowledge

of the " legal rate " thus established against him and by any departure therefrom knowingly commits the offense denounced. (*Camden Iron Works* v. *U. S.*, 158 Fed. Rep., 561, 565.)

See also opinion of Judge Buffington, pp. 569–570.

The court will note that in this opinion Judge Gray takes precisely the attitude toward " participation " as a means of proving that the " legal rate " has been " established " that is contended for by us above.

(*c*) In the cases of *Chicago, Burlington & Quincy R. R. Company* v. *United States* (209 U. S., 90) and *Armour Packing Company* v. *United States* (209 U. S., 56), although the precise point was apparently not thought worthy of argument by the appellants, the decision of the court necessarily sustained and rested upon our view of the law. In these cases the through line ran from Kansas City to New York. The Burlington Company, the defendant carrier, operated from Kansas City to St. Louis. It had neither filed nor published any joint tariff for the through rate, but was governed merely by the terms of its local rate between these points. East of the Mississippi River its connecting carriers had filed and published a through rate from St. Louis to New York. The Burlington Company accepted shipment in Kansas City on through bills for New York at a rate lower than the sum of its local rate to St. Louis plus the filed rate beyond.

It was not alleged or proved that the concession came from the local rate of the Burlington, and the illegal through rate accepted by the carriers was large enough to fully cover the Burlington's local rate. On the contrary, the indictment expressly charged the Burlington with making a concession from the rates of the other carriers east of the Mississippi, which the Burlington had neither filed nor published and in which it had only participated by engaging in through traffic. Yet the indictment was held good by all the courts and the Circuit Court of Appeals fully discussed the reasons for its decision.

POINT FOUR.

To sustain the Defendant's contention would emasculate not only the Elkins law but the Hepburn law as well.

1. The decision of Judge Holland in the *Woods case, supra,* and that of Judge Landis in the *Reichman case, supra,* interpreting this rebate clause of the Elkins law, were rendered, respectively, on April 2, 1906, and February 27, 1906, during the debates of Congress upon the Hepburn bill and prior to the enactment of that bill into law on June 29, 1906. The latter law, when enacted, reenacted these provisions of the Elkins law substantially unchanged. If the Elkins law is defective in the respects asserted by the court below, the Hepburn law is equally defective.

But the court can not infer that Congress contemplated passing a defective statute. On the con-

trary, it must infer that the Hepburn law was passed in reliance upon the construction placed upon the Elkins law by the decisions of Judges Holland and Landis. (*Lauder* v. *Stone*, 187 U. S., 281; *Spencer* v. *Phila. Smelt. & Refining Co.*, 124 Fed. Rep., 1002–1003; *Robinson* v. *Downing*, 127 U. S. 607, 613.)

2. A very large portion, if not the bulk, of the freight business of the country is transported under joint tariffs.

> It is so much a matter of railroad history that through routes and joint rates have for a long time obtained among all the great interstate railroads that the court might well take judicial knowledge of it. The commerce of the country can not be safely and expeditiously carried on without them. (*Smelter* v. *St. L. & S. F. R. Co.*, 158 Fed. Rep., 649, 656.)

If, therefore, rebates in respect to joint tariffs can not be published, the entire purpose of the interstate commerce acts as to a large part of the nation's freight business is frustrated.

3. Nor are there any provisions in the acts which would afford an adequate remedy to take the place of the one eliminated by this decision of the court below. The defendant suggested below that the proper course for the Government in this case would have been to prosecute for failure to file the tariff under the second clause of the Elkins law.

But if that were the only remedy, the law would be pitifully inadequate. In the first place, the

shipper who received the rebates would escape entirely, provided the rebates were paid by a carrier who had not filed the tariff. The great admitted aim of the Elkins and Hepburn laws in respect to placing shippers under the same liabilities as carriers would be wholly frustrated in respect to joint tariffs.

Again, even against the carrier such a remedy would be wholly ineffective. In the first place no matter how many rebates were paid or concessions granted, and no matter over how long a period these violations had extended, there could at most be only one offense committed, and at most only one penalty exacted. In the light of the admitted difficulty which was found in enforcing the original interstate commerce act of 1887 until the Elkins law, with its possibility of large cumulative fines, was enacted it could easily happen that such an interpretation of the law would result in virtually licensing a carrier to extend preferences to a shipper, provided that the business of the shipper was large enough to make it worth the risk. The carrier could well afford to pay the single penalty, if by so doing it could with impunity establish a private rate with a shipper like the Standard Oil Company. It would thus put a premium upon favors to large shippers.

In the second place, such an offense would be much more difficult to establish than actual payments of rebates or concessions. The prosecutor would be obliged to establish a negative, and the

charge of not filing a tariff would be open to innumerable defenses of accident or unintentional neglect of employees, etc. The force of such objections may be appreciated from the fact that although this clause has been in the Elkins law since 1903, we know of no prosecution which has been attempted under it with the single exception of one in the Western District of New York. (*U. S.* v. *N. Y. Central R. R. Co.*, 153 Fed. Rep., 630.)

POINT FIVE.

Other objections raised by defendant's demurrer to the indictment may be briefly disposed of.

The court below rendered its decision solely upon the question which we have argued in the foregoing points. Several other questions were, however, raised by the demurrer, which may be briefly disposed of as follows:

1. The contention of the interstate commerce and Elkins laws are unconstitutional, because not applying to carriers solely by water (see Demurrer, paragraphs 25 and 26), and has been treated in the government's brief, in case No. 57, against the same defendant.

2. The contention that said statutes are unconstitutional and void for attempting to impute to the corporation the acts of its agents and for attempting to submit it to criminal punishment for the acts of its employees (Demurrer, paragraphs 27 and 28) has been treated in our brief in said case No. 57.

3. The contention that the offenses charged in the separate counts of this indictment are not separate offenses has been taken up in our brief in said case No. 57.

4. There is no merit in the contention that it is not alleged that the sum charged to have been paid by way of rebate and concession was paid unlawfully or with criminal intent. (Demurrer, par. 44.)

See *Armour Packing Co.* v. *U. S.*, 209 U. S., 56, 85; *Ellis* v. *U. S.*, 206 U. S., 246, 257.

See also *Van Gessner* v. *U. S.*, 153 Fed. Rep., 46, 54, where the court said:

> When the facts alleged necessarily import such willfulness, the failure to use the word itself is not fatal. Such failure, under such circumstances, would not be fatal even at common law.

5. The objection that counts one and two of this indictment do not show that the acts in question took place after the passage of the Elkins law (Demurrer, paragraphs 46, 47, and 48) are answered in our brief in case No. 69 against the same defendant. This court will notice that this objection to the indictment applies only to counts one and two, and not to the remaining ten counts.

6. The contention in paragraph 49 of the Demurrer that the Elkins law was repealed by paragraph 10 of the Hepburn law was decided adversely to the defendant by this court in the case of *Great Northern R'way Co.* v. *U. S.* (208 U. S., 452.)

It is therefore respectfully submitted that the decision of the Circuit Court should be reversed and the demurrer to the indictment in all respects overruled.

WADE H. ELLIS,
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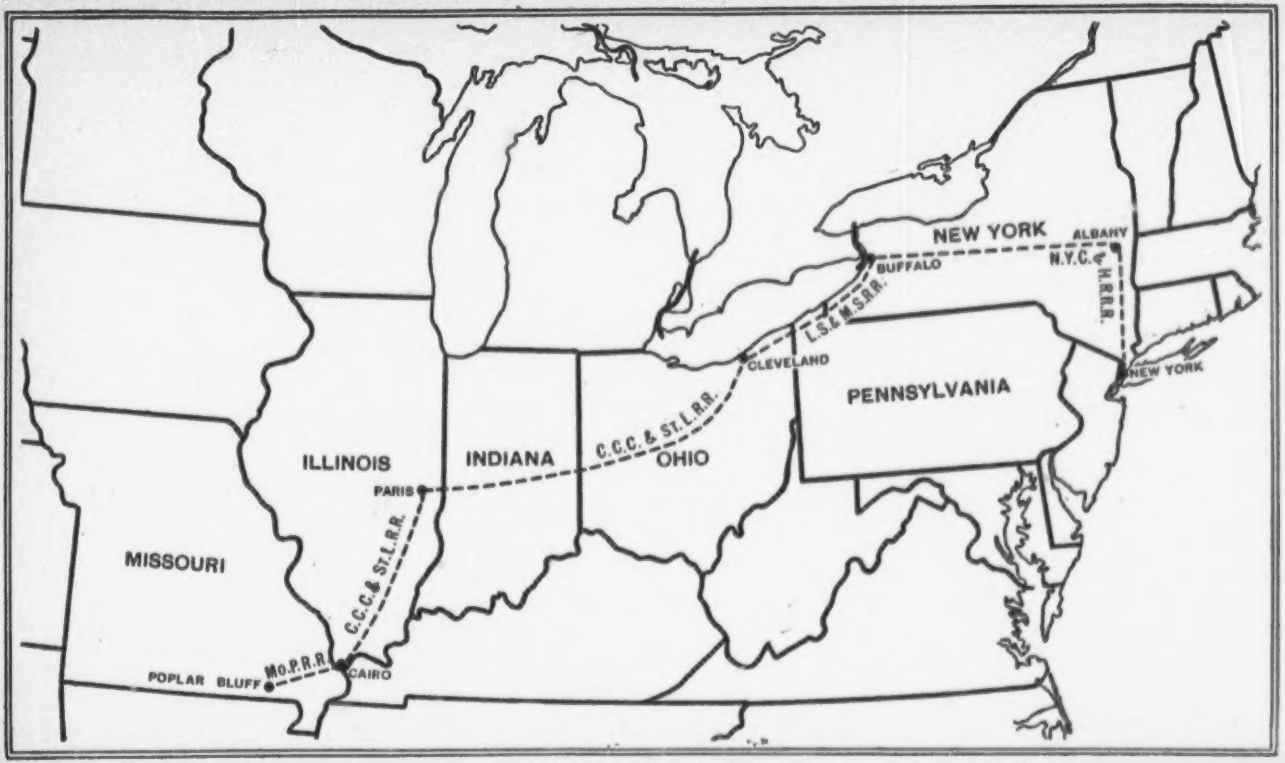
HENRY L. STIMSON,
United States Attorney.



THROUGH LINE OF THE FOUR CARRIERS.

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Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 285.

THE UNITED STATES, *Plaintiff in Error,*

v.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Brief and Argument for the Defendant in Error.

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THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1908.

THE UNITED STATES, Plaintiff in Error, vs. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.	No. 285.

BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

The indictment, which contains twelve counts, alleges that at all the times therein mentioned the Missouri Pacific Railway Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Lake Shore & Michigan Southern Railway Company, and the defendant, had established a continuous through line and route from Poplar Bluff, Missouri, to the City of New York, and "under a common management, arrangement and control, handled and transported freight and property for hire" from Poplar Bluff to New York; and had jointly *established*, and that the *Missouri Pacific Railway Company had filed* with the Interstate Commerce Commission, and *published* a joint tariff of rates, fares and charges, in which the rate set forth and in force from Poplar Bluff to New York upon cooperage materials was thirty-five cents for each one hundred pounds (Record, pp. 3–4).

It is then alleged that in *January, 1898*, Nathan Guilford, the defendant's traffic manager, acting for the defendant, and Lowell M. Palmer, president of, and acting for, the Brooklyn Cooperage Company, which manufactured cooperage material at Poplar Bluff and shipped it thence to New York by various common carriers operating lines leading out of that place,

> "entered into an unlawful agreement and arrangement whereby it was agreed that the said Brooklyn Cooperage Company should and would ship . . . cooperage material over the aforesaid through line and route from the aforesaid City of Poplar Bluff to the aforesaid City of New York, and that the aforesaid common carriers should and would transport and cause to be transported such cooperage material over the aforesaid continuous line and route from the said City of Poplar Bluff to the said City of New York, and that the said Brooklyn Cooperage Company should and would pay, and cause and procure to be paid, to the aforesaid common carriers, the lawful rates and charges, and that thereafter the aforesaid New York Central and Hudson River Railroad Company should and would repay to the said Lowell M. Palmer, as agent for and acting on behalf of and for said Brooklyn Cooperage Company as aforesaid, the sum of five and four-fifths cents for each one hundred pounds of the said cooperage material so transported, in respect of such transportation of the same, and thereby reduce said lawful tariff . . . in and by said amount, with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid," &c. (p. 3).

Under and pursuant to this "unlawful agreement and arrangement," the cooperage company, it is alleged, delivered and caused to be delivered to the Missouri Pacific at Poplar Bluff, for shipment to New York, cooperage material, which was accordingly transported to New York

> "by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting com-

> mon carriers, over the aforesaid continuous line and route, under a common management and control,"

and on which the lawful rate was duly paid, as follows:

In 1903, during the month of February, one car load weighing 37,100 (1st count, p. 5) and 500,800 (2d count, p. 7); March, 146,100 lbs. (3d count, p. 8); April, 131,350 lbs. (4th count, p. 9); May, 201,300 lbs. (5th count, p. 11); June, 297,750 lbs. (6th count, p. 12); July, 61,000 lbs. (7th count, p. 13), and 247,000 lbs. (8th count, pp. 14–15); August, 221,300 lbs. (9th count, p. 16); September, 167,200 lbs. (10th count, p. 17); December, 128,300 lbs. (11th count, p. 18), and 129,000 lbs. in January, 1904 (12th count, p. 20).

The charging parts of the indictment aver that under and pursuant to the alleged unlawful agreement the defendant and Guilford paid, and caused to be paid, to Palmer, for the benefit of the Cooperage Company, as rebates and concessions,

> "in respect of the transportation of the aforesaid . . . cooperage material,"

the following sums of money:

1. On August 27, 1903, $21.52 in respect of one of the February shipments, $290.46 in respect of the other February shipment, and $84.74 in respect of the March shipment (1st, 2d and 3d counts, pp. 6, 7, 8, 9);

2. On September 16, $76.18 in respect of the April shipment, and $116.75 in respect of the May shipment (4th and 5th counts, pp. 10, 11);

3. On November 16, $162.25 in respect of the June shipment, and $35.38 in respect of one of the July shipments (6th and 7th counts, pp. 12, 14);

4. On December 16, $143.26 in respect of the other July shipment (8th count, p. 15);

5. On January 29, 1904, $128.35 in respect of the August shipment, and $96.97 in respect of the September shipment (9th and 10th counts, pp. 16, 17–18);

6. On May 25, $74.41 in respect of the December shipment (11th count, p. 19); and

7. On September 23, $74.82 in respect of the January shipment (12th count, p. 20).

The charge is that the property having been "transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting carriers," the New York Central paid a sum of money "by way of rebate and concession in respect of the transportation of the aforesaid . . . cooperage materials," and *so* (concluding paragraph of each count)

> "unlawfully and wilfully did . . . give a rebate and concession in respect of the transportation of property in interstate commerce by *a* carrier, subject to the said Act to regulate commerce and the acts amendatory and supplemental thereto, whereby said property was transported by *said* corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid, published and filed by *such common carrier* as required by said Act to regulate commerce and the acts amendatory and supplemental thereto" (p. 6).

Among the objections to the indictment specially assigned by the demurrer, are the following:

(*a*) That Congress is without power under the constitution to impute to this corporation the commission of a criminal offense and subject it to punishment by reason of the matters set forth in the indictment (pp. 23; *29*).

(*b*) That the acts described and set forth do not constitute a crime under the laws of the United States (pp. 21-22; *1* to *12*) in that

> "it is not in any of the counts alleged that by reason of the matters therein set forth and described any property was transported in interstate or foreign commerce by the defendant as a common carrier at a less rate than that named in any tariff published and filed by the defendant, as required by the said Act to regulate commerce and the Acts amendatory thereto, or that thereby any other advan-

tage was given or discrimination was practiced" (pp. 25-26; *45*).

(*c*) That the acts described and set forth in the *first and second counts* do not constitute a crime,

> "in that it does not appear therefrom that the property in respect of the transportation of which the sums therein mentioned were paid was transported after the going into effect of the Act of February 19, 1903" (p. 26; *46*); and

(*d*) That the matters described and set forth in the indictment constitute but one transaction, and cannot be severed or divided into separate transactions, or made the basis or subject of separate charges, or separately punished (p. 23; *30*).

The point that the indictment was defective in failing to allege that the rebates resulted in the transportation of property at a less rate than that named in any tariff "filed and published *by the defendant*," or in other advantage or discrimination, which the court below regarded as the "substantial ground of demurrer" (p. 28), was the only one of these objections considered in the opinions handed down by the learned District Judge. In holding the indictment bad because of this omission he said:

> "The giving of a rebate was only rendered a crime by the statute, which in my opinion limits the offense by plain words, to the giving of rebates 'whereby any such property (*i.e.*, property in interstate transit) shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier.' The words 'such carrier' can only refer to the carrier proceeded against, and unless that carrier filed or published the violated tariff the statute affords no remedy by indictment for the second offense enumerated" (p. 29).

POINT ONE.

Even though it were true that the method of rebating charged by this indictment was prevalent prior to

1902, was reported to Congress by the Interstate Commerce Commission and that provisions were inserted in the Elkins Act for the avowed purpose of stopping the practice, the failure of the framer of the statute to effect this purpose cannot be overcome by any judicial addition to its language.

> "A case omitted is to be held as intentionally omitted."
>
> *Broom's Legal Maxims*, 56.
>
> "When a provision is left out of a statute, either by design or mistake of the Legislature, the Courts have no power to supply it."
>
> *Hobbs* vs. *McLean*, 117 U. S., 567, 579.
>
> "No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."
>
> *United States* vs. *Goldenberg*, 168 U. S., 95, 102.
>
> "Courts of justice can give effect to legislative enactments only to the extent to which they are made operative by a fair and liberal construction of the language used. *It is not their province to supply defective enactments* by an attempt to carry out fully the purposes which may be *supposed* to have occasioned those enactments. This would be an assumption by the judicial of the duties of the legislative department."
>
> *Swift* vs. *Luce*, 27 Me., 285.

The plain meaning of language cannot be enlarged in order to meet a conceded, still less a supposed, object of the legislature. Nor are courts to be swerved from the proper interpretation of language, by a consideration of consequences which it is apprehended may flow from such interpretation.

> "What the legislative intention was, can be derived only from the words they have used;

> and one cannot speculate beyond the reasonable import of these words: The spirit of the act must be extracted from the words of the act, and not from *conjectures aliunde*."
>
> Story, *J.*, in *Gardner* v. *Collins*, 2 Pet. 5893.

In holding for a plain construction in a case in which the Court saw that its decision might "operate to defeat the object" of an act of Parliament, Lord TENTERDEN said, in Rex *v.* Barham, 8 B. & C. 99,

> "It is better to abide by this consequence than to put upon it a construction not warranted by the words of the act in order to give effect to what we suppose to have been the intention of the legislature."

In *Hadden* v. *Collector*, 5 Wall., 107, 111-2, the Court said:

> "What is termed the policy of the Government with any particular legislation" is "a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes."

It is sufficient to say of the various expressions and rulings by the Interstate Commerce Commission, which are cited in the Government's Brief that in no one of the matters cited was there any need for any carrier to assert the view which the court below sustained.

The Government cites no case in which a court has decided contrary to the view already expressed by this Court. The language quoted from the decisions upon which he relies was not used with reference to the only point which the court below determined.

Opinions of individual legislators "are of little or "no weight on questions of construction and are "generally inadmissible."

> *U. S.* v. *Trans-Missouri Freight Ass.*, 290 U. S., 318.

Still less are we concerned with the motives of individual legislators.

> *Alldridge* v. *Williams*, 3 How. (U. S.), 9.
>
> *Soon Hing* v. *Crowley*, 113 U. S., 703.

POINT TWO.

The provisions of the first section of the Elkins Act do not, expressly or upon any fair construction of its language, cover or make criminal the transaction set out in the indictment.

The "successive penal enactments of this section do not overlap." The same transaction may not be covered by more than one prohibition. But two general classes of offenses are defined and made punishable, 1, wilful failures to file or strictly to observe tariffs when filed, and, 2, unjust discrimination by means of rebates or other devices; but each class, and each different offense within each class, is a separate and distinct character of offense. Thus, the same act could by no imaginable possibility constitute both a wilful failure to file and a failure strictly to observe a filed tariff. So within the meaning of the statute a rebate is a different thing from a concession or discrimination, precisely as the same differ from each other. Certainly the payment of a rebate is neither an omission to file or to observe a tariff. The theory that although it was drawn "with special reference to the rebate clause" the indictment can be supported upon any other provision is therefore quite unsound. But of that we shall speak later.

1. *The transaction is not covered by the "rebate clause of the Elkins Act."*

The learned counsel for the government think the court below was mistaken in assuming that the words "such carrier" (in the phrase "tariffs published and filed by such carrier") referred to the carrier proceeded against as defendant.

According to their view, the "carrier" mentioned in that phrase is the carrier which transports the

property, which in the case at bar they say "might be any *one* of the four carriers, *e. g.*, the Missouri Pacific, which actually had filed the tariff." They point out that the words used in enumerating the persons who may commit the offense is "corporation," which cannot be limited to carriers, since the rebate clause expressly penalizes the acceptance, as well as the giving, of rebates, and after suggesting that the construction given to it by the court below would make it "impossible to prosecute any shipper," argue that the language of the section

> "penalizes any person or corporation who pays a rebate with respect to the transportation of property by any carrier, even though that carrier is an entirely different corporation." (Brief for the Government, p. 19.)

"This," they say, "has been *expressly decided* in a case where a rebate was paid by a private car company which had not conducted the transportation," and they cite *Int. C. C.* v. *Reichman,* 145 Fed. Rep. 235.

That case arose on an "application by the Interstate Commerce Commission requiring a witness before it to answer a question." The precise point decided was that a private car company which delivers its cars to railroad companies for the use of shippers and receives pay for such use from the railroad companies on a mileage basis is within the rebate provision of the Elkins Act. It was held that when such a car company allows to a shipper who uses its cars a rebate whereby the shipper secures transportation of his property at a less rate than that named in the tariff published by the railroad company its act is a violation of the statute, although it pays the rebate from its own funds, and without the knowledge or connivance of the carrier. The point of the decision was (p. 240) that the rate filed and published by the carrier which actually transports the property may not be "varied by some intervening or co-operating or

sub-serving agency" as a private car company. The question here presented was not even raised, much less considered.

In describing those who may commit the offense therein defined and made punishable, the rebate clause uses the words "any person, persons or corporation." These are terms of unlimited extent and are broad enough to comprehend every human and corporate being. But general expressions of this character must always be limited to cases falling within the legitimate operation of the statute in which they are used. Though the word "any" is frequently used in the sense of "all" or "every," like all other words, its meaning must be restrained and limited by the context or subject matter. The only persons whom Congress intended by this law to punish, and the only persons capable of violating it, were (1) carriers, individual or corporate, or persons acting in their behalf, and (2) shippers, individual or corporate, or persons acting in their behalf. Concededly, the rebate clause was intended to apply to any person or corporation of either class. The only reason, doubtless, why the two classes were not specified was that it was easier and simpler to frame the sentence in the form in which it appears, than in the clumsy manner an enumeration of all the persons who could violate it would require, *e. g.*,

> "It shall be unlawful for any carrier or person acting on behalf of any carrier to offer, grant or give, or for any shipper, or person acting on behalf of any shipper to solicit, accept or receive, any rebate."

Had the clause been enacted in this form the words "any carrier" would of course have been "*such* carrier." The *form* in which they accidentally appear is therefore of no significance.

The Piracy Act of 1790 (ch. 36 [IX]) provided that "if any person or persons shall commit, upon the high seas . . . murder or robbery, or any

other offense which, if committed within the body of a country, would by the laws of the United States, be punishable with death . . . every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being convicted thereof shall suffer death." In *United States* v. *Palmer*, 3 *Wheat*, 610, the question was whether this Act extended farther than to American citizens, or to persons on board American vessels, or to offerses committed against citizens of the United States. In deciding this question in the negative the court said (per Marshall, *Ch. J.*, at pp. 631-63):

> "The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them . . . In describing those who may commit treason or felony the words used are 'any person or persons;' yet these words are necessarily confined to any person or persons owing permanent or temporary allegiance to the United States. The 8th section also commences with the words 'any person or persons.' But these words must be limited in some degree, and the intent of the legislature will determine the extent of this limitation. For this intent we must examine the law."

In this view, the "plain grammatical construction" of the sentence (Brief for the Government, p. 19) is to confine a prosecution for rebate giving to a corporation, or persons acting in its behalf, when the rebate is in respect of transportation by *such* carrier and results in a reduction of the rate filed "by *such carrier*" as required by the Act.

> "The legal distinction between remedial and penal statutes is this: that the former give relief to the parties aggrieved, the latter impose penalties for offenses com-

mitted," *Endlich*, Interpretation of Statutes (Amer. Ed., 1888) § 333.

"When the statute acts upon the offender and inflicts a penalty as the pillory or a fine, it is then to be taken strictly; but where the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally."

Smith v. *Townsend*, 148 U. S., 490, 497.

The government's contention is that the efforts of the Commission were:

"First.—To secure legislation compelling carriers who *did not file* or publish a joint tariff to put on record written evidence of their *concurrence* in it.

"Second.—For legislation making participation in a through rate *filed by another carrier* binding upon a connecting carrier who so participates in the rate, irrespective of *whether it had filed that rate or not.*" (Brief for the Government, p. 10.)

The task before the government is, therefore, to satisfy the court that we should read into the statute the words *"whether it had filed that rate or not, and whether carried by another carrier or by itself."* Confessedly the words are not there. Confessedly, also, there are the recurring and limiting words by which the tariff violation of which is punished, is described as a tariff "published and filed by such carrier." The clause which follows immediately after this expression begins, it is true, with the general words: "Every person, or corporation who shall offer or give or receive any *such* rebates shall be deemed guilty of a misdemeanor." Plainly, Congress was making no new classification. "Every person or corporation," accordingly must mean only "every *such* person or corporation," as had just been described. If this be not so, and if we are to give to the words the unlimited meaning for which the Government contends, what was the use of the preceding clause? If the court below be

right, each clause is significant. The second clause of the Act makes it a misdemeanor either to fail to file, or strictly to observe, such tariffs *when filed*, punishable in each case by a fine of twenty thousand dollars. Then follows the clause which makes the giving of any rebate from the rate named in the tariffs published and filed by such carrier unlawful, but imposes no penalty. Finally, comes the clause which imposes the penalty for giving or taking "*such* rebates;" and this can refer only to the rebates which had just been described as rebates from the tariffs so "published and filed." The ultimate argument left to the Government is to contend that the use of the word "any" in the earlier part of the section removes all restriction and includes within the statute "any" carrier that gives a rebate from any tariff, whether filed by it or not, and whether the carrier was the carrier that transported the property or not.

Thus we come back to the original question: Will the court construe a statute which creates a new offense so as to include offenses which are not plainly and unmistakably within the language which Congress has used?

Congress provided ample means for preventing the doing of the very things of which the defendant in error is accused. This we have shown already.

If Congress had intended to punish a carrier for departing, in any way, from any tariff, in which the carrier might participate, whether filed by it, or by some other carrier, how easy it would have been to say so, in plain unmistakable language. The natural place to put such a provision was in the part of the statute which required carriers to conform to these tariffs. There Congress might easily have made it an offense for a carrier to fail strictly to observe, or to deviate from, any tariff in which it should participate, *whether filed by it, or by any other carrier* concerned in the transportation of

the property in respect to which the transaction related. Is not the absence of the direct provision conclusive?

The Government is quite right in its position that the language in the clause on which it relies covers carriers and shippers alike and, consequently, we must not attribute to Congress an intention to insert in that clause a punishment for an act which could only be committed by a carrier, namely, the giving of a rebate in reduction of a tariff which it had neither published nor filed. Shippers, or persons who are not carriers, are punishable for receiving concessions from tariffs filed by others; that is to say, by carriers. Carriers are punishable for giving concessions from tariffs published and filed by themselves.

There is nothing in this clause to show that Congress intended to depart from the general scheme, the broad purpose of which was, First, to secure publicity by requiring every carrier to publish its tariff, and to compel its obedience by punishment, or by mandatory process, or both. Second: By punishment and mandatory process, to prevent any departure by a carrier, from the tariffs that the carrier might file with the Interstate Commerce Commission; and Third: To prevent by punishment the acceptance of rebates by shippers.

The Elkins Act, as construed by the court below, accomplishes fully all those ends. If we go further and, by construction, extend the statute to cover by indictment a departure from a tariff, with the filing and publishing of which the carrier had no part, we attribute to Congress an intention, not only to punish the carrier because it did not file a tariff in which it participated, but also the intention to punish it just as heavily for departing therefrom as if it had filed and published the tariff originally. This is to run counter

to established principles. It overlooks the fact that full power is given to the Government to compel obedience to the law and prevent the doing of the act charged (see *Elliott* v. *Penn. R. R. Co.*, 99 U. S., 573), and the rule that any doubt whether the offense is plainly and unmistakably within the statute is to be resolved in favor of the accused.

It is, of course, not enough for the Government to point the court to a possible construction by which the defendant in error *may* be included within the statute. It is now more than twenty years since the statute was passed, and the court is assured in the brief filed for the Government that the so-called "practice" of giving rebates under the circumstances set forth in the indictment has been quite widespread, if not general (Brief for the Government, p. 5). If this be so, it is not without significance that this is the first time that the Government has asserted the broad construction for which it now contends, especially as the Interstate Commerce Commission not only had knowledge that the plaintiff-in-error had not filed the tariff, but was under a duty to compel it to do so.

A statute which creates "a new liability, unknown to the common law, is to be strictly construed, and is not to be extended beyond the clear import of its terms."

Nor. Pac. Ry. Co. v. *Whalen*, 149 U. S., 157.

There "can be no constructive offense" and "if there be any fair doubt whether the statute embraces" the case of the accused, "that doubt must be resolved in favor of the accused."

United States v. *Clayton*, 2 Dill., 219, followed in

United States v. *Biggs*, 157 Fed., 264, 270.

This rule applies particularly to statutes which create crimes.

United States v. *Whittier,* 5 Dill., 35, 39.

See also,

Bolles v. *Outing Co.,* 175 U. S., 262.
United States v. *Sheldon,* 2 Wheat., 119.
United States v. *Morris,* 14 Pet., 694.
United States v. *Clayton,* 2 Dill., 226.
United States v. *Reese,* 5 *Id.,* 413.

In *U. S.* v. *Wiltberg,* 5 Wheat., 76, 95, the court, speaking through Mr. Chief Justice Marshall, said that the rule which requires a strict construction of penal statutes is founded

> "on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment."
>
> "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason, or *mischief* of a statute, is within its provisions. so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a genuine rule for other cases."

In that case it was argued by the Attorney General, said the court, "with great force," that it was "incredible" that Congress did not intend to include within the statute the offense of which

the defendant stood charged. Indeed, the court said:

> "The probability is, that the legislature designed to punish all persons amenable to their laws, who should, in *any place*, aid and assist in or advise any person, or persons, to commit *any* murder or piracy punishable under the act."

The court, however, refused to construe the statute so as to include an offense which was not committed in one of the places specifically named in the statute.

In *Maxwell*, Interpretation of Statutes (4th Ed.), p. 397, it is said, citing *Proctor* v. *Mainwaring*, 3 B. & A., 145,

> "If the Legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which fall within the *mischief intended* to be *prevented*, it is not competent to a court to extend them."

Care must be taken, not in order to bring people, by implication, within the terms of a penal statute, but rather than "no one is brought within the statute who is not within its express language."

London County Council v. *Aylesbury* [1898], 1 Q. B., 106.

In that case the court thought that the statute "probably intended to cover such a case" as that presented, but held that the mere fact that "one can apparently gather that such an intention was probable" was not enough to warrant the court in "reading into it the words" which were required to cover the case in express terms.

2. *The indictment cannot be sustained under the first clause of the Elkins Act.*

(See our brief in No. 57, at pp. 92-96, and in No. 69, pp. 35-36.)

3. *Nor under the second clause which penalizes a wilful failure to observe the tariff.*

(See our brief in No. 57, pp. 93-95.)

4. The *fifth clause of the Act is a mere statutory rule of evidence.* We need not discuss the validity of this provision which is more than doubtful. It certainly attempts to do nothing more than to establish a rule as to the effect to be given to evidence.

(See our brief in No. 57, pp. 96-97.)

POINT THREE.

There is nothing in the opinion of the court in the Cisco Oil Mill case bearing directly or indirectly upon any question involved in the case at bar.

We are unable after the most diligent examination to find in the *Cisco* case any expression or intimation having the least bearing upon any point here presented.

POINT FOUR.

To sustain the defendant's contention would not emasculate either of the present Interstate Commerce Statutes.

The court below did not hold "that a carrier can with impunity pay rebates from a joint tariff established by itself, in which it has participated, and which has been duly filed and published by its connecting carrier, provided that the carrier in question has not itself filed or published the same tariff" (Brief for the Government, p. 4). What it did hold was that unless "the carrier proceeded against" filed or published the violated tariff, the statute affords no remedy by indictment for the second

offense enumerated," viz., the giving of rebates (Record, p. 29).

But the Interstate Commerce Law has at all times since 1887 provided most sweeping and drastic measures, not only for the punishment of the only offense of which the plaintiff has been guilty but the enforcement of which, by those whose duty it was to enforce them, would have made the transaction upon which the indictment is based impossible.

When the Missouri Pacific Railroad Company, *prior* to January, *1898*, filed with the Interstate Commerce Commission, the joint tariff set forth in the indictment, and the other carriers who were parties to the tariff neglected to file it, the Government had direct knowledge that the defendant had subjected itself to the very rigorous provisions of the statute. Not only was the defendant at that time guilty of a misdemeanor, but the Interstate Commerce Commission was under a statutory mandate to compel its compliance with the law and to enjoin it from doing business under the joint tariff until after it had filed the same.

The Interstate Commerce Commission was created and established by the Act to Regulate Commerce of February 4, *1887*, which went into effect April 5, 1887.

U. S. Stat. at L., Vol. 24, p. 379.

It appears by the indictment that about *eleven years later* the Missouri Pacific Railway Company and three other connecting common carriers, all of whom were subject to the provisions of the Act, had established a continuous through line and route from Poplar Bluff to the City of New York, and a joint tariff of rates for the transportation of property between these places under a common management, arrangement and control; and that prior to January 1, 1898, the Missouri Pacific had filed this joint tariff with the Commission "as required by law, and had published (it) in accordance with the directions of

the . . . Commission as required by law" (Record, p. 4).

The Commission, therefore, had actual knowledge more than five years before the passage of the Elkins Act, and more than nine years before the present prosecution was instituted, that this defendant had neglected to file its tariffs as required by Section 6.

For this neglect the defendant was by that section (as amended March 2, 1889), in addition to the other penalties therein prescribed, subject to a writ of mandamus to compel compliance with the provisions in question, failure to obey which was punishable as and for a contempt; and it might, moreover have been restrained by injunction, from receiving or transporting property until it had complied with such provisions.

The same section made it unlawful for any party to a joint tariff to charge, demand, collect or receive a greater or less compensation than was specified in the schedule "filed with the Commission in force at the time."

Sections 2 and 3 prohibited carriers from engaging in unjust discrimination (*e. g.*, the receipt by means of rebates, etc., of a greater or less compensation from one person than that received from another for like services, etc.), or giving unreasonable preferences or advantages, and Section 10 made provision for the punishment of these and other violations of the Act.

It should be observed that whereas the Elkins Act made the transportation at a less rate than that specified in the tariff filed *by the carrier giving them* a necessary ingredient of the offense, the original act was violated if, by any rebate, a carrier received from one shipper a greater or less compensation than it received from another for a like and contemporaneous service under substantially similar circumstances and conditions.

By Section 12 the Commission was authorized to inquire into the management of the business of

all carriers subject to the provisions of the Act. It was required to "keep itself informed as to the manner and method in which the same is conducted." It was given the right "to obtain from carriers" full and complete information necessary to perform the duties and carry out the objects for which it was created. "It was *authorized and required to execute and enforce*" the provisions of the Act. It was made the duty of United States Attorneys to institute and promote under the direction of the Attorney-General all necessary proceedings for the enforcement of the Act, and for the punishment of all violations thereof. The Commission was moreover given power "to require by subpœna the attendance and testimony of witnesses and the production of all books and documents relating to any matter under investigation."

What then becomes of the argument that the decision of the Circuit Court "would defeat the purpose and destroy the whole force of (the Elkins and Hepburn Acts) so far as through freight traffic is concerned" (Brief for the Government, p. 5)?

If it be true that the defendant made itself liable to punishment because it failed to file a given tariff, the inaction of the Government during the nine years that preceded the sudden determination to enforce this law furnishes no warrant for distorting language in order to meet the Government's activity in the pursuit of this defendant.

The dangers that come when, as Albert Gallatin said, the "strict and common sense of words are construed away because of some supposed necessity," are known only too well to judges and other students of history.

The government says the "precise question raised by the demurrer has been repeatedly decided against the defendants' contention by the courts, and cites

U. S. v. *Wood*, 145 Fed. Rep., 409.
Camden Iron Works v. *U. S.*, 158 Fed. Rep., 561-569-570.

Chicago, Burlington & Quincy R. Co. v. *U. S.*, 209 U. S., 90.

Armour Packing Co. v. *U. S., Id.*, 56.

Of the case of *Camden Iron Works* v. *U. S.* it is enought to say that the holding was that the clause in question

> "simply provides the rule as to the effect to be given to evidence of participation when a carrier is being tried for a violation of the Act" (150 Fed. Rep., at p. 218)

The passage cited from the *Wood* case shows conclusively that in that case, as in the *Armour* and *Burlington* cases, the precise point here presented was not considered. The decision of the Circuit Court of Appeals in the *Burlington* case is however distinctly in our favor. The contention there was that the indictment was bad in that it failed to allege any joint tariff or any *published schedule of joint tariffs* from Kansas City to New York or elsewhere, and failed to allege what, if any, the rate was between those points.

No other question of criminal pleading was raised or discussed. It was not argued by either side that the defendant could be held criminally liable for making unjust concessions unless it had filed *some* tariff. As a matter of fact the indictment in the *Burlington* case charged and the evidence showed a departure from the local tariff *filed and published by that company.* In overruling the contention of the Burlington Company the court made use of language plainly sustaining the position here taken by the court below and showing how a carrier which has filed its *local* rates, but has not become a party or filed a *joint* tariff, may still be prosecuted when it engages in practices which result in the transportation of property at rates other than those specified in the tariff which it *has* filed.

There was plainly no intimation by the court in the *Burlington* case that a carrier who has filed no

tariff can be punished for failing to file it, and at the same time be punished for wilfully failing to observe tariff which it had not filed.

That no such thought was in the mind of the court can be seen from the language of the opinion. It is true that in discussing the question of the existence of a through rate, the court said:

> "It is not essential to the commission of the offense of giving a concession from a through rate over connecting lines of a railroad that the rate be a *joint* one established by all of the carriers and published and filed with the commission."

But the court immediately went on to observe:

> "If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no *joint* through rate has been published and filed by the commission, the lawful rate to be charged is the sum of the established *local rates, published and filed by the individual roads;* or if, as was the case here, there is a local rate over one road and a joint rate over the others for the remainder of the route, *all published and filed with the commission,* the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a *joint* through rate of traffic accepted for interstate transportation, each participating carrier impliedly asserts that the rate *which it has duly established, published and filed for its own line,* shall be a component part of the through rate to be charged. It is competent for carriers, if conditions justify it, to make their proportions of a through rate less than the local charges upon their own lines, but in doing so they should observe legal methods and if no action to that end is taken, they in effect adhere to the rates established, *published* and *filed by them,* as applying not only to local but to through traffic."

The court was discussing the question of what constitutes a through rate, and was not dealing with the question of the interpretation of the statute here presented, but which was not raised or discussed in that case.

The Government Attorney might perhaps have cited the *Burlington* case with some force if the indictment in the case at bar had alleged that the lawful rate to be charged by the four carriers including the New York Central was the sum of "the established local rates *published and filed by the individual roads,*" or that there were both local and joint rates by the various carriers over a through route from Poplar Bluff to New York *"all published and filed with the Commission."*

POINT FIVE.

Even though the Circuit Court had erred in the views expressed in its opinions, the demurrer was nevertheless properly sustained, since the indictment is otherwise fatally defective.

(a) *The constitution and laws of the United States do not authorize the indictment of a corporation for a crime.* (This proposition is discussed in our brief in No. 57.)

(b) *The acts described in the first and second counts do not constitute a crime in that it does not appear therefrom that the property, in respect of the transportation of which the sums therein mentioned were paid, was transported after the going into effect of the Elkins' Act* (Demurrer, p. 26; *46*).

The point of this objection is, as the demurrer states that Congress was without power under the Constitution to subject the defendant to punishment by the

Act of February 19, 1903, for offering, giving or granting rebates, concessions or discriminations in respect of the transportation of the property mentioned in these counts, it not appearing that the same, or any part thereof, was transported after the going into effect of the Act, and such transportation having presumably constituted completed transactions in interstate commerce prior to its taking effect; and that Congress was without power, under the Constitution, after the completion of these transactions to legislate in respect to or otherwise deal with them (p. 26; *47–48*).

This proposition is discussed in our Brief in No. 67, and therefore need not be further extended here.

The indictment alleges that the shipments, consisting of "one carload of the aforesaid cooperage material, the same weighing 37,100 pounds" (1st count) and "500,800 pounds of such cooperage material" (2d count) were delivered to the Missouri Pacific at Poplar Bluff "*during the month of February, 1903 (the exact date being to the jurors unknown)*" and that they were "*thereupon*" transported by the Missouri Pacific and its connecting carriers to New York. The rebates in respect of these shipments are alleged to have been paid on August 27, 1903.

It is submitted that unless these shipments were made after the Elkins Act went into effect no offense was committed under that statute by the subsequent payment of rebates in respect of their transportation; and that since this does not appear by any affirmative allegation, these counts must fail.

(c) *The matters set forth in the indictment constitute but one transaction, and cannot be severed or divided into separate transactions, or made the basis of separate charges, or separately punished.*

In No. 57, six payments made in discharge of seven claims were made the subject of six counts. In No. 69, one payment "on account" of five claims

was made the basis of a single count. In the present case *twelve* payments made on *seven* different days in discharge of twelve claims are made the basis of twelve counts. Thus three payments alleged to have been made on August 27, 1903 (1st, 2d and 3d counts), are charged as three separate crimes.

It being apparent that the transaction upon which the indictment is based was a continuous one, all of the alleged payments being made under and pursuant to the same alleged unlawful agreement and arrangement, and in respect of the property transported in accordance with that agreement, but a single crime was committed.

(See our Brief in No. 57, pp. 99–107.)

CONCLUSION.

The judgment of the Circuit Court should be affirmed.

Respectfully submitted,

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